

Letter of Findings: 04-20170122; 10-20170121
Gross Retail and Food and Beverage Tax
For the Years 2013, 2014, and 2015

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

The Department agreed with Hospitality Company that its purchase of a piano was not subject to tax because Hospitality Company provided documentation establishing that the tax was paid to the original vendor; the Department did not agree that its sales of food and beverages to a professional organization were exempt from either sales or food and beverage tax because Hospitality Company should not have accepted professional organization's exemption certificate.

ISSUE

I. Gross Retail Tax and Food and Beverage Tax - Exempt Transactions.

Authority: IC §§ 6-2.5 et seq.; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-5-25; IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); IC § 6-9-20-5; IC § 6-9-20-6; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). [45 IAC 2.2-5-55](#)(d); Commissioner's Directive 30 (October 1, 2013); Sales Tax Information Bulletins 10 (April 2012).

Taxpayer argues that the Department's assessment of tax is overstated and that it can present documentation which lessens that assessment.

STATEMENT OF FACTS

Taxpayer is an Indiana hospitality business which operates hotels and restaurants. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in an additional assessment of both sales/use tax and food and beverage tax. Taxpayer disagreed with the assessment on the ground that it had obtained additional information which - had it been available at the time of the audit - would decrease the amount of the assessment. Taxpayer submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative presented the information and explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax and Food and Beverage Tax - Exempt Transactions.

DISCUSSION

The issue is whether the additional documentation provided by Taxpayer is sufficient to establish whether certain transactions were exempt from either gross retail tax and/or food and beverage tax.

The proposed assessment of both gross retail tax and food and beverage tax constitutes evidence that the Department's claim for the unpaid tax is valid, and each taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A retail merchant - such as Taxpayer - is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes" IC § 6-2.5-9-3.

The Department assessed tax on certain capital asset purchases including the purchase of a Yamaha piano. Although - because of Taxpayer's procurement requirements - the transaction was conducted through an intermediary, Taxpayer presented a copy of the original invoice establishing that tax was paid on the original transaction. Accordingly, the audit assessment should be adjusted to account for the tax originally paid on this particular transaction.

IC § 6-9-20-5 requires that Vanderburgh County vendors collect a one-percent food and beverage tax on sales of food and/or beverages.

The county food and beverage tax imposed on a food or beverage transaction described in section 4 of this chapter equals one percent (1[percent]) of the gross retail income received by the merchant from the transaction. For purposes of this chapter, the gross retail income received by the retail merchant from such a transaction does not include the amount of tax imposed on the transaction under [IC 6-2.5](#).

Commissioner's Directive 30 (October 1, 2013), 20131127 Ind. Reg. 045130521NRA, explains generally the applicability of the tax. The Directive states in part:

The food and beverage tax applies to any transaction in which food or beverage is furnished, prepared, or served by a retail merchant for consumption at a location or on equipment provided by the retail merchant in a county or municipality that adopts the tax.

Vanderburgh County's food and beverage tax is imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under IC §§ 6-2.5 et seq. IC § 6-9-20-6. In other words, Vanderburgh County's food and beverage tax piggy-backs the exemptions applicable to Indiana's gross retail tax.

Taxpayer explains that a local professional services organization presented it with an exemption certificate (ST-105) claiming an exemption on the food and beverages it purchased during the organization's regular bi-weekly meetings.

Under IC § 6-2.5-5-25, a taxpayer's transactions involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service primarily uses the property or service to carry on or to raise money to carry on its not-for-profit purpose. [45 IAC 2.2-5-55\(d\)](#) expands on IC § 6-2.5-5-25 stating that this exemption will not apply if such property is primarily used for a purpose other than the not-for-profit purpose of the organization. As used in this section, "primarily used in carrying out the not-for-profit purpose" means that the item or service is used more than fifty percent of the time to further the organization's not-for-profit purpose. Taxpayer's professional services organization has as its publicly stated purpose the provision of humanitarian services, the encouragement of ethical behavior, and the advancement of world peace. Therefore in order for Taxpayer to establish that the purchases of food and beverages were exempt, the purchases must be used more than fifty percent of the time to further the organization's not-for-profit purposes.

Taxpayer is, of course, not in a position to readily determine if the social organization's purchases were used to advance the organization's humanitarian, ethical, or world peace goals. However, the exemption certificate clearly states that it "[m]ay not be used for hotel rooms and meals." The requirement is emphasized in Sales Tax Information Bulletins 10 (April 2012), 20120530 Ind. Reg. 045120248NRA, which states that, "**Purchases for the private benefit of any member of the [nonprofit] organization, such as meals and lodgings, are not entitled for exemption.**" (Emphasis in original).

As to the food and beverage purchases, Taxpayer should not have accepted the exemption certificate and is now liable for those taxes.

FINDING

Taxpayer's protest is sustained in part and denied in part. The Department's audit division is requested to review the original assessment and to make whatever adjustment is necessary to reflect the determination that Taxpayer paid sales tax on the purchase of the piano.

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